89-1647

No. _____

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1989

CARNIVAL CRUISE LINES, INC.,
Petitioner,

vs.

EULALA SHUTE and RUSSEL SHUTE,
Respondents.

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF THE INTERNATIONAL COMMITTEE OF PASSENGER LINES AS *AMICUS CURIAE*, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN A. FLYNN
(Counsel Of Record)
JAMES B. NEBEL
GRAHAM & JAMES
One Maritime Plaza
San Francisco, California 94111
(415) 954-0200
Counsel for The International Committee of Passenger Lines, as Amicus Curiae

BOWNE OF SAN FRANCISCO, INC. • 180 NINTH ST. • S.F. CA 94103 • (415) 864-2300

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The International Committee of Passenger Lines ("International Committee") respectfully moves this Court for leave to file the accompanying *Amicus Curiae* Brief in support of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit. Petitioner has consented to leave for this purpose, but Respondent has not. Therefore, leave to file must be sought pursuant to Supreme Court Rule 37.2.

1. NATURE OF *AMICUS'* INTEREST

The International Committee is a domestic non-profit association of sixteen passenger cruise lines operating 81 vessels in and about North America. Passenger cruises have become increasingly popular, and now represent a substantial market for vacation

time and expenditure by United States citizens.[1] Cruise vessels typically visit multiple ports of call (foreign and domestic) and attract passengers from many locales in the United States. The use of forum selection clauses in passenger ticket contracts, designating a single venue for resolution of legal actions, is a universal practice. The Petition for Writ of Certiorari presents, in part, the question of the enforceability of such forum selection clauses.

2. RELEVANT MATTERS RAISED BY THIS *AMICUS* BRIEF WHICH MAY NOT BE ADDRESSED BY THE PARTIES

The International Committee believes there are important considerations of national uniformity of maritime law raised by the Petition for Writ of Certiorari which directly impact on the passenger cruise industry in the United States. Although fully endorsing Petitioner's reasons for granting the Writ of Certiorari on the first question presented—whether the lower court correctly determined that it could properly exercise specific personal jurisdiction—the Brief that this *Amicus Curiae* seeks leave to file is limited to the Petitioner's second question—concerning the enforceability of a forum selection clause in a steamship passenger ticket contract.

The Committee's *Amicus* Brief presents the cruise industry's perspective in seeking resolution of the conflict between the Ninth Circuit in the decision below and the Third Circuit in *Hodes v. S.N.C. Achille Lauro Ed Altri-Gestione*, 858 F.2d 905 (3d Cir. 1988), *petition for cert. dismissed*, 109 S.Ct. 1633 (1989), as to the enforceability of these clauses. This issue is important to the

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[1] There has been a tremendous growth in the passenger cruise market over the past ten years. This market has increased from 1.4 million North American passengers in 1980 to over 3.3 million in 1989. It is estimated that in 1990, 3.5 million North American passengers will enjoy ocean cruises and that the figure will reach 10 million by the year 2000. *See* Cruise Lines International Association, "The Cruise Industry, An Overview" (unpublished report, January, 1990).

member lines of the International Committee because they are exposed to claims and suits in multiple jurisdictions.

Both the decision of the Ninth Circuit in this case and of the Third Circuit in *Hodes* rely principally on this Court's decision in *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) ("*The Bremen*"). The International Committee believes that the Ninth Circuit's decision is contrary to the principles established in *The Bremen* as to the presumptive enforceability of such forum clauses and represents a retreat to an earlier time when the courts held a provincial and disfavored view of such provisions.

The International Committee believes it can materially contribute to resolution of the important legal question of the enforceability of forum selection clauses in passenger ticket contracts. The issue has obvious importance beyond the interests of the Petitioner alone because each member cruise line relies on a forum selection clause in its ticket contract. As owners and operators of cruise vessels carrying United States passengers, each member of the International Committee has an immediate and substantial interest in resolving the conflict among the Circuits, and in establishing uniformity of the maritime law in the United States on this issue.

Respectfully submitted,

JOHN A. FLYNN
(Counsel Of Record)
JAMES B. NEBEL
GRAHAM & JAMES
One Maritime Plaza
San Francisco, California 94111
(415) 954-0200
Counsel for The International Committee of Passenger Lines, as Amicus Curiae

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BRIEF OF THE INTERNATIONAL COMMITTEE OF PASSENGER LINES AS *AMICUS CURIAE*, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. SUMMARY OF ARGUMENT

The Ninth Circuit's decision below, holding that a forum selection clause in a passenger cruise ticket contract is unenforceable on grounds of public policy as a contract of adhesion, is squarely in conflict with the Third Circuit's decision on the same issue in *Hodes v. S.N.C. Achille Lauro Ed Altri-Gestione*, 858 F.2d 905 (3d Cir. 1988), *petition for cert. dismissed*, 109 S.Ct. 1633 (1989). Both Circuit Courts relied on this Court's decision in *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) ("*The Bremen*"), holding that such a clause in a commercial maritime contract is entitled to presumptive validity. The Ninth Circuit's decision, refusing to grant such deference to the clause because it was included in a so-called contract of adhesion, is contrary to the rule of *The Bremen*. It is imperative to the passenger cruise industry that this Court establish a uniform rule to govern this aspect of maritime law.

II. REASON FOR GRANTING WRIT OF CERTIORARI

A. THE COURT SHOULD RESOLVE THE CONFLICT AMONG THE CIRCUITS AND ESTABLISH A UNIFORM LEGAL STANDARD FOR ENFORCING A FORUM SELECTION CLAUSE IN A MARITIME PASSENGER CONTRACT

The passenger ticket involved in this case is a maritime contract, and is governed by the substantive law of admiralty, not by the law of the states. *See The Moses Taylor,* 71 U.S. (4 Wall.) 411, 427 (1867); *and see Romero v. International Terminal Operating Co.,* 358 U.S. 354 (1959), *rehearing denied* 359 U.S. 962 (1959). The national interest in promoting the uniformity of the maritime law was originally set forth in *The Lottawanna,* 88 U.S. (21 Wall.) 558 (1874), and is based on Article III, Section 2 of the United States Constitution, which extends the judicial power of the United States to "all cases of admiralty and maritime jurisdiction."

The nature of maritime commerce requires that the substantive rules of law regulating the rights and responsibilities of shipowners and their passengers should not vary according to the jurisdiction in which the vessels operate. The need to establish and maintain uniform maritime laws has been repeatedly endorsed by this Court. *See e.g. Southern Pacific Co. v. Jensen,* 244 U.S. 205 (1917); *Garrett v. Moore-McCormack Co.,* 317 U.S. 239 (1942); *Romero v. International Terminal Operating Co., supra;* and *Moragne v. States Marine Lines, Inc.,* 398 U.S. 375, 401-402 (1970).

The cruise line members of the International Committee issue passenger ticket contracts which include forum selection clauses. The ticket issued by Petitioner Carnival specifies a Florida forum, its principal place of business, for adjudicating disputes by passengers.

Ticket contracts have been used by cruise lines and other carriers of passengers for more than one hundred years. In fact, the issue of whether the terms and conditions of a ticket can be enforced by a common carrier was first brought to this Court in *The Majestic,* 166 U.S. 375 (1897) (holding that a provision in a

ticket limiting liability for lost or damaged baggage was unenforceable because it was not sufficiently incorporated into the portion of the ticket that constituted the contract), and was subsequently considered again in *New York Central & Hudson River Railroad Co. v. Beaham,* 242 U.S. 148 (1916) (holding that a ticket provision limiting liability for lost or damaged luggage was prima facie enforceable.) Numerous lower courts have dealt with the same issues. *See e.g.* cases cited in Annot. 31 ALR 4th 404, 415-438 (1989).

In the leading case of *Silvestri v. Italia Societa Per Azioni di Navigazione,* 388 F.2d 11 (2d Cir. 1968), Judge Friendly noted that the common thread running throughout the cases upholding limiting provisions in ticket contracts was the undeniable fact that the vessel owner had essentially done all that it reasonably could to warn the passengers that the conditions of the contract were important and affected their legal rights. When the terms and conditions of the ticket have been "reasonably communicated," they have been held to be binding.[2]

A contractually designated forum serves a legitimate purpose. In view of the diverse residences of passengers and the distant locales that cruise vessels may visit, a forum selection clause removes doubt as to where suit can be brought and avoids global litigation. See *The Bremen,* 407 U.S. at 13-14.

In *The Bremen,* this Court confirmed that a maritime contract is subject to interpretation under admiralty law, and held that the forum-selection clause in the contract was presumptively valid and enforceable. The decision in *The Bremen* represented this Court's approval of the trend away from the historical disfavor in

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[2] Decisions that applied the test of "reasonable communicativeness" to passenger tickets containing limiting clauses and enforced such provisions include, among others, the following: *Muratore v. M/S Scotia Prince,* 845 F.2d 347 (1st Cir. 1988); *Marek v. Marpan Two, Inc.,* 817 F.2d 242 (3d Cir.) *cert. denied* 484 U.S. 852 (1987); *Barbachym v. Costa Line, Inc.,* 713 F.2d 216 (6th Cir. 1983); *Carpenter v. Klosters Rederi A/S,* 604 F.2d 11 (5th Cir. 1979); and *McQuillan v. "Italia" Societa Per Azione di Navigazione,* 386 F. Supp. 462 (S.D.N.Y. 1974), *aff'd* 516 F.2d 896 (2d Cir. 1975).

which forum selection clauses had been held by some American courts. In *Scherk v. Alberto-Culver*, 417 U.S. 506, *rehearing denied*, 419 U.S. 885 (1974), this Court extended the rule of *The Bremen* to non-maritime contracts.

The ticket contract and facts presented to the Third Circuit in *Hodes* were similar to those in this case. A passenger was injured during an ocean voyage on a cruise ship. A forum selection clause contained in the ticket contract was asserted by the cruise line. As did the Ninth Circuit below, the Third Circuit relied upon *The Bremen* as providing the guiding principle. The Third and Ninth Circuits, however, reached different conclusions.

In *Hodes*, after ruling that the forum clause was effectively incorporated into the ticket contract, the court rejected the passenger's argument that the contract was unenforceable because of its adhesive nature. Relying on *The Bremen* and, in part, on the Restatement (Second) of Conflict of Laws, § 80 (1971), the Third Circuit held that there was no *unfair* use of unequal bargaining power and that the forum clause should be enforced. In contrast, the Ninth Circuit in this case held that, because of the adhesive nature of the contract (based on the presumed disparity in bargaining power), the forum selection provision was not entitled to such deference and was unenforceable as a matter of public policy. Pet. App. 46a-47a.[3]

The Ninth Circuit's decision in this case squarely conflicts with the Third Circuit in *Hodes* on the issue of the enforceability of a forum selection clause in a maritime passenger ticket contract. The conflict results directly from the Circuits' differing interpretation of this Court's decision in *The Bremen*.

The enforcement of forum selection clauses in passenger cruise contracts has been the subject of recurrent litigation in the lower courts. In light of the present conflict among the Circuits, this will likely occur with even greater regularity. Resolution of the confl

[3]The decision of the Ninth Circuit is reported at 897 F.2d 377. References to the decision in this Brief, however, will be to Petitioner's Appendix.

flict is essential to national uniformity under the maritime law and important to the passenger cruise industry.

B. The Court Should Correct The Decision Below Which Is Contrary To The Prima Facie Validity Accorded Forum-Selection Clauses In *The Bremen*

In *The Bremen*, this Court held that a forum selection clause in a maritime contract should control, absent a strong showing to the contrary. 407 U.S. at 15. Under this rule, the party seeking to resist enforcement of the chosen forum must bear a heavy burden of proof, even if the contract is characterized as adhesive. Id. at 17.

After acknowledging that this Court's decision in *The Bremen* controlled, the Ninth Circuit held that, because the passenger ticket contract was one of adhesion, the forum selection clause "should not receive the deference generally accorded [to] such provisions". Pet. App. 47a. By emasculating the heavy burden of proof which should have been cast on the passenger—even if the contract were adhesive—the Ninth Circuit ignored the rationale of this Court's decision in *The Bremen*. In addition, the Ninth Circuit reached its decision without mentioning either *Hodes* or the numerous other federal cases enforcing forum selection clauses in similar ticket contracts.[4]

After rejecting the presumptive validity of the forum clause, the Ninth Circuit proceeded to analyze the issue by weighing the relative conveniences of the plaintiff's chosen forum against the reasonableness of the contractual forum. The legal effect of the failure of the Ninth Circuit to accord presumptive validity to the

[4] *See e.g. Catalana v. Carnival Cruise Lines, Inc.*, 618 F. Supp. 18 (D. Md. 1984), *aff'd*, 806 F.2d 257 (4th Cir. 1986); *Everett v. Carnival Cruise Lines Inc.*, 677 F. Supp. 269 (M.D. Pa. 1987); *Hollander v. K-Lines Hellenic Cruises, S.A.*, 670 F. Supp. 563 (S.D.N.Y. 1987); *Walker v. Carnival Cruise Lines, Inc.*, 681 F. Supp. 470 (N.D. Ill. 1987); and *Wilkinson v. Carnival Cruise Lines, Inc.*, 645 F. Supp. 318 (S.D. Tex. 1985).

forum selection clause was to erroneously convert the issue for consideration into one of *forum non conveniens*.[5]

III

CONCLUSION

The International Committee of Passenger Lines respectfully urges the Court to grant the Petition for Writ of Certiorari to resolve the conflict among the Circuits and establish a uniform rule of maritime law, consistent with the precedent established by this Court.

Respectfully submitted,

JOHN A. FLYNN
(Counsel Of Record)
JAMES B. NEBEL
GRAHAM & JAMES
One Maritime Plaza
San Francisco, California 94111
(415) 954-0200
Counsel for The International Committee of Passenger Lines, as Amicus Curiae

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[5] The practical effect of the decision below encourages pre-trial motion practice, and necessitates the attendant expense. As noted by Mr. Justice Kennedy in his concurring opinion in *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 33 (1988), the federal judiciary has a strong interest in eliminating wasteful pre-trial motion practice. Correcting the decision below to conform with the presumptive validity of forum selection clauses as established in *The Bremen* will promote such interests and provide guidance to the district courts.